

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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March 29, 2007

In the Matter of

Estuary at Port Norfolk Condominiums, by
the Trustees of its Condominium Board,
Geoffrey Bok, Gregory Comella, Ronald
Filipski, Daniel Greene and Emy Thomas

Docket No. DEP-05-426; 2005-019
DEP File No. PAN-BO-05-6001

Docket No. DEP-05-427; 2005-020
DEP File No. UAO-BO-05-6001

Boston (Dorchester)

Final Decision

The Trustees of Estuary at Port Norfolk Condominiums (“Trustees”) appealed an administrative order and penalty issued by the Department for failure to construct public amenities required by a Chapter 91 license for land originally intended for a larger project and subsequently partially taken by eminent domain. Because I disagree with the conclusion of the Administrative Magistrate that the license is void, I reject the Recommended Decision, which addressed the issue of whether the condominium Trustees are responsible for the license violations and if so, to what extent. In this decision, I address the issues of whether the license is void, the responsibility of the Trustees as successors in interest for license violations, and the Department’s enforcement action. I sustain in part the Administrative Order and modify the penalty assessment.

Prior Proceedings

The Department issued a license in 1987 and an amendment in 1988 (together, the “license”) to a prior developer to construct a 73 unit residential condominium with associated roadways and utilities on a 12.55 acre site containing four parcels between Walnut Street and the Neponset River in Dorchester. The license required the provision of public access along the waterfront, a gazebo, a public viewing platform, a ramp and float, a granite block seawall, and a stormwater drain. Part of the project, 22 condominiums, was built on one 2.15 acre parcel containing filled tidelands, but the public amenities were only partially completed. In 1995, the Metropolitan District Commission, now the Department of Conservation and Recreation (“MDC/DCR”), acquired by eminent domain two adjacent parcels for \$560,000, the 2.76 acre parcel along the Neponset River and a 7.23 acre area of flowed tidelands under the River. In July 2003, the Department issued a notice of noncompliance followed in January 2005 by an administrative order requiring the Trustees, the current owners of the condominium, to construct the public benefits and assessed a \$12,000 civil administrative penalty for failure to comply with license conditions.

The Trustees appealed, claiming that they should not be required to construct the public benefits on property they do not own and that responsibility to provide any benefits should be apportioned according to the division of property by the taking. They further claimed that any penalty was excessive. The Administrative Magistrate framed the threshold issue for adjudication as whether the trustees were responsible for the violations of the license. The Trustees argued that their obligation to comply with the license was limited to the condominium property because the license requirements run

with the subdivided parcels. The Department argued that the license requirements applied to the private use of the entire original site and that the Trustees as successor owners are required to provide the benefits on land now owned by MDC/DCR, as offsite benefits are not uncommon in Chapter 91 licenses.

Although not raised by either party, in a Partial Summary Decision the Administrative Magistrate found that the 1987 license and 1988 amendment were rendered void by the eminent domain proceeding because it resulted in a substantial change in use. He further reasoned that because the project required a new license in 1995, due to the taking by the state, the Trustees were not responsible for the license violations. He recommended that the Trustees be issued a new license effective as of the time of the taking with public benefits reasonably related to the existing use of the land.

The Trustees were satisfied with this result, but the Department cautioned against a finding that the license is void, as the existing buildings would not meet the requirements of the current regulations and would need to be relocated away from the water's edge at greater expense than compliance with the administrative order and payment of the penalty.¹ Reiterating that they should not be adversely affected by the taking, the Trustees argued that the Department should be ordered to issue a new license authorizing the structures in existence in 1995 with conditions for public amenities for the smaller project as completed on property owned by the trust. In the alternative, the Trustees advocated for a ruling that their responsibility under the license was limited to the condominium property or that the license was void only as to the MDC/DCR parcel.

¹ The regulations were substantially revised in 1990, soon after the licenses were issued. Once a license is void, the previously licensed uses and structures require a new license application, even if they were used or constructed in conformance with the license. 310 CMR 9.05(1)(a); 310 CMR 9.26(2). See Tilton v. City of Haverhill, 311 Mass. 572 (1942) (under Chapter 91, a license is void, not merely voidable, for failure to record).

In a Recommended Decision, the Administrative Magistrate confirmed the Summary Decision, concluding that the license is void and recommending that the Trustees be granted either a license or a variance to avoid any disadvantage from the taking.

Whether the License is Void

I reject the conclusion in the Recommended Decision that the license is void, a finding the Administrative Magistrate based on the significant increase in public access and recreational space and reduction in residential use that resulted from the MDC/DCR taking. Under the statute, any unauthorized substantial change in use or substantial structural alteration renders a license void. M.G.L. c. 91, s. 18.² Noncompliance does not render a license void, however, absent an unauthorized substantial change in use, unauthorized substantial structural alteration, or a failure to record. 310 CMR 9.26(2). A “substantial change in use” is defined as “a use for a continuous period of at least one year of ten per cent or more of the surface area of the authorized or licensed premises or structures for a purpose unrelated to the authorized or licensed use or activity, whether express or implied.” M.G.L. c. 91, s. 1; 310 CMR 9.02.

The definition does not apply to the facts of these licenses. License No. 1601 issued in 1987 for these parcels contains this “Use Statement:” “The structures and fill authorized hereby shall be limited to the following uses in tidelands: Residential use with

² Under the statute, any changes in use or structural alteration of a licensed structure or fill require a new license, while any unauthorized substantial change in use or structural alteration renders the license void. M.G.L. c. 91, s. 18. Thus, the legislature established a higher standard for unauthorized work that would void a license, as opposed to work that would simply be subject to a new application. The provision in Chapter 91 making licenses void for alteration of structures or change in use was added in 1983 amendments to reflect the Boston Waterfront holding that public tidelands must continue to be used for a proper public purpose. 1983 Mass. Acts 589, s. 26; Boston Waterfront Development Corp. v. Commonwealth, 378 Mass. 629 (1979). Amendments in 1986 added the qualification that alterations and change in use must be “substantial” to render the license void, as elaborated in statutory definitions. 1986 Mass. Acts 348. “Change in use” and “structural alteration” are not defined terms in the statute or the regulations.

associated parking, walkways and landscaped areas, public access and recreational use, and shoreline stabilization from coastal erosion.” The Order of Taking specifies “park and reservation and protection of open space purposes,” and the MDC/DCR land apparently remains as undeveloped open space. There is no evidence in the record to support a finding that more than ten percent of the surface area has been used for a purpose unrelated to the uses authorized in the license. In fact, the existing land uses of residential condominiums and public open space, are generally consistent with the use statement in the license.³ Accordingly, there is no “substantial change in use” and the license is not void.⁴

Whether the Trustees were responsible for license violations

The responsibility to comply with the license is not limited to the original licensee; subsequent owners of property must comply with the license. 310 CMR 9.23(1).⁵ The phrase “runs with the land” as used in the regulations means that successors in interest to licensed land have a continuing obligation to conform to all conditions in a license. 310 CMR 9.23(1). The recording of the license provides notice to successors in interest of license requirements. 310 CMR 9.18. Whether property governed by a license has been conveyed in its entirety, divided, or taken by eminent domain, generally the successors in interest must conform to the license conditions and plans for their parcel, unless other responsibilities are established in the license. Water-

³ Even though more than ten percent of the surface area may not conform to the uses in the locations as shown on the license plans, those uses nonetheless continue to be consistent with the Use Statement in the license.

⁴ Any failure of the various specified uses to conform to the proper locations as shown on the license plan indicates noncompliance with the license, which provides grounds for revocation. 310 CMR 9.26(1). In its administrative order and penalty, the Department appropriately seeks compliance rather than revocation.

⁵ It appears from the record that the original licensee, Port Norfolk Condominium Inc. (“PNC”), had failed to comply with the license at the end of its first five years by failing to complete the work as required, but it is not clear when construction actually took place. The Administrative Magistrate was incorrect, however, in stating that there was no timetable to complete the work.

based public benefits, such as docks and landings, are frequently required in Chapter 91 licenses and will of necessity extend from upland private property to tidelands generally owned by the state. In this case, the public viewing platform and gazebo associated with the Trustees' parcel extend to a boat landing facility on land taken by the MDC/DCR, a state agency. These facilities are clearly associated with, and would be attached to, the Trustees' parcel, and the Trustees are responsible for this construction absent an objection from the DCR or other basis for a license amendment.

Filled Commonwealth tidelands must continue to be used for a proper public purpose, which means that the project must continue to provide greater public benefits than detriments to the public rights in tidelands. Boston Waterfront Development Corporation v. Commonwealth, 378 Mass. 629 (1979); 310 CMR 9.14(3).⁶ Prior to issuing a license, the Department must determine that the benefits exceed the detriments to the public's rights in "said lands." M.G.L. c. 91, s. 18. Because this determination is made based on a proposed project, and weighs in favor of the public on the entirety of the land governed by the license, it continues to apply to the original licensed parcel. When property subject to a license has been divided, it is reasonable to expect that property owners taking land subject to a license will comply with the conditions shown for their parcels. When the Department seeks to enforce against one or more owners for noncompliance, it may reasonably proceed against the owner of the land where there are violations of license terms or conditions as shown on the plans.

⁶"Commonwealth tidelands" are held by the Commonwealth or a private party by license or grant subject to an implied condition subsequent that they be used for a proper public purpose. The license itself does not convey a property right; essentially is conveys a privilege to a private party to use public property. M.G.L. c. 91, s. 15.

Although the conclusion of the Recommended Decision is premised on injury to the Trustees from the failure of the original developer to complete the work and the subsequent taking, the violation alleged here is the failure of the present owner to conform to the license. The Trustees were required to provide amenities on and extending from their property as described in the license conditions and failed to do so. They are not, as described by the Administrative Magistrate, “innocent property owners next door” to the MDC/DCR. The Trustees had notice of the requirements through the recorded license and plans. They had an affirmative obligation to check the license and confirm their compliance. Uncertainty as to their responsibilities on the MDC/DCR property after the taking does not excuse the lack of compliance for conditions associated with the private uses on their own property.

While the Trustees argue that they should not be expected to provide the same level of public benefits as the larger project that had envisioned more units, the plan reveals that the area within Chapter 91 jurisdiction is predominantly located within the area occupied by the condominium structures that were actually constructed and now comprise the Estuary at Port Norfolk. Only a relatively small amount of jurisdictional area of filled Commonwealth tidelands that had originally been slated for condominium development is now owned by DCR. Other than the gazebo and landing facility that extends from the condominium property out over the water, it appears that only a portion of the harbor walk is within Chapter 91 jurisdiction on MDC/DCR property. Therefore, the public benefits required by the license for the private use of tidelands are properly provided by the Trustees.

The Administrative Order and Penalty Assessment

As this case arises in the context of enforcement under its Administrative Penalty regulations, the Department must show that an act or omission occurred which constitutes a violation of Department regulations. 310 CMR 5.36. The Trustees, as successors in interest to the original licensee, own property subject to the license. The Department has shown that they are responsible for compliance with the license conditions as they apply to, and are associated with, their property. The order and penalty assessment, however, identify as violations provisions of the regulations that are not applicable to this project. The license for this project was issued prior to the effective date of the 1990 regulations. Although several sections of 310 CMR 9.35 were cited as violations, 310 CMR 9.35 does not apply to licenses issued before 1990. 310 CMR 9.09(4). The enforcement provisions at 310 CMR 9.08 are applicable to the project and it appears from the penalty calculation worksheet that the Department relied upon that provision as the basis for a penalty of \$1000. The Trustees clearly violated license conditions under 310 CMR 9.08, and therefore, I uphold the penalty of \$1000 assessed for this violation. I find that this penalty amount is not excessive, as it clearly does not exceed an amount that is proportionate to the nature of the violation, noncompliance with substantive conditions of a c. 91 license. See Matter of Associated Building Wreckers, Docket No. 2003-132, Final Decision (July 6, 2004).

I affirm the administrative order issued to the Trustees which requires the construction of the public viewing platform and gazebo, the boat landing facility, the posting of signage, the provision of handicapped parking spaces, the repair of the walkway, and compliance with the license as it applies to their property. However, I

allow the Trustees three years from the date of this Final Decision to complete any work requiring compliance with the Wetlands Protection Act, as the 90 days specified in the Order appears to be too short a timeframe. The Department should confirm whether the work as required by the original license is consistent with any plans DCR may have and whether DCR will allow the Trustees to complete the work affecting its parcel. If DCR does not grant permission to the Trustees within one year from the date of this Final Decision to comply with any conditions of the license related to DCR property, the Trustees will be responsible for compliance with the license only on condominium property as shown on the plans. This decision does not preclude the DCR and the Trustees from seeking an amendment to the license, to reflect the change in ownership or location of structures as consistent with the regulations. 310 CMR 9.24.

The parties to this proceeding are notified of their right to file a motion for reconsideration of this Decision, pursuant to 310 CMR 1.01 (14)(d). The motion must be filed with the Docket Clerk and served on all parties within seven business days of the postmark date of this Decision. A person who has the right to seek judicial review may appeal this Decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Decision.

This final document copy is being provided to you electronically by the Department of Environmental Protection. A signed copy of this document is on file at the DEP office listed on the letterhead.

Arleen O'Donnell
Acting Commissioner

